JUL 19 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-109

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALAN H. LEVINE
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
Attorney for Petitioners

BURT NEUBORNE
MELVIN L. WULF
Of Counsel

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Question Presented 2

Statement of the Case 2

Reasons for Granting the Writ 4

1. Constitutional principles of academic freedom limit the power of school boards even over allegedly educational matters 8

2. The removal of the book deprived students of their First Amendment right to know 10

Conclusion 12

Appendix

Opinion of the United States Court of Appeals 1a

Memorandum of Decision and Order 12a

Judgment 26a

Table of Authorities

Cases:

Adler v. Board of Education, 342 U.S. 485 (1952) (Black, J., dissenting) 11

Bartels v. Iowa, 262 U.S. 404 (1923) 8

Brown v. Board of Education, 347 U.S. 483 (1954) 7

PAGE

Damico v. California, 389 U.S. 416 (1967) 8

Epperson v. Arkansas, 393 U.S. 97 (1968) 4, 5, 8, 9

Garrity v. New Jersey, 385 U.S. 493 (1967) 10
Ginsberg v. New York, 390 U.S. 629 (1968) 11

Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) 9
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 7, 9

McNeese v. Board of Education, 373 U.S. 668 (1963) 8
Meyer v. Nebraska, 262 U.S. 390 (1923) 8, 10
Monroe v. Pape, 365 U.S. 167 (1961) 8

NAACP v. Button, 371 U.S. 415 (1963) 10

Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) 9

Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955) .. 9
Shelton v. Tucker, 364 U.S. 479 (1960) 5-6, 10
Stanley v. Georgia, 394 U.S. 557 (1969) 7
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 5

Tinker v. Des Moines Indep. Community School District, 393 U.S. 503 (1969) 8, 11

West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943) 6, 8

Constitutional Provisions:

United States Constitution

First Amendment 2, 9, 10

PAGE

Statute:

28 U.S.C. 1254(1) 2

Other Authorities:

Hutchins, Robert, "The Constitution of Public Education," *The Center Forum*, Vol. II, No. 4 (July 1969) 10

Nelson and Roberts, *The Censors and the Schools*, 28-37 (1963) 4

New York Times, April 12 and 14 and June 17, 1972 .... 6, 7

Note, "Dismissal of Federal Employees—The Emerging Judicial Role," 66 Col. L. Rev. 719 (1966) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 21, 1972.

Opinions Below

The opinion of the district court is not officially reported. It is set out in the Appendix, *infra,* pp. 12a to 25a. The opinion of the Court of Appeals is reported at 457 F.2d 289 and is set out in the Appendix, *infra,* pp. 2a to 11a.

Jurisdiction

The judgment of the Court of Appeals was entered on March 21, 1972. On June 8, 1972, Mr. Justice Marshall issued an order extending the time within which to file this petition for writ of certiorari up to and including July 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether a school board violates the First Amendment rights of the librarian and students when it orders the removal from a school library of a critically acclaimed and serious book, concededly lawful for distribution to minors, because it contains four-letter words and describes sexual activities.

Statement of the Case

This civil rights action concerns a book entitled *Down These Mean Streets,* by Piri Thomas, a highly acclaimed work portraying the process of growing up in the Puerto Rican ghetto of East Harlem in New York City. Copies of the book were purchased by the librarians for three

junior high schools in New York City's Community School District No. 25. The copies remained in the libraries, available for student use, until a parent complained that *Down These Mean Streets* contained four-letter words and described sexual activities. In response to the parent's complaint, Community School Board No. 25 adopted the following resolution by a vote of 5-3, on April 19, 1971:

> "The Superintendent is hereby directed to remove *Down These Mean Streets* from all student libraries in the district."

This lawsuit, brought on behalf of a librarian, a principal, teachers, students and parents of students at schools at District 25, followed. Subsequently, on June 2, 1971, the Board passed a so-called "parent option plan" which permitted those schools which originally had the book to permit its direct loan to parents. Other schools in the district remained under the ban imposed by the Board's original resolution.

The librarian and teachers who used the book in class submitted affidavits expressing the belief that it was a particularly effective portrayal of life in the ghetto and an important adjunct to the junior high school curriculum. Those supporting the ban, however, thought that the book's language was too harsh and that its occasional depictions of sex would adversely affect the emotional and psychological development of the early teenage youngsters reading it.

In reply affidavits, junior high school students made light of the suggestion that they were unfamiliar with or would be led astray by the language or sex scenes in the book, adding that the book made them more sensitive to

the conditions endured by those who live in the slums. Several eminent psychologists and psychiatrists dismissed as simplistic and unsupportable the contention that the scenes depicted in *Down These Mean Streets* could have an adverse impact on the psychological development of children.

Reasons for Granting the Writ

Despite the frequency with which local pressure groups succeed in persuading school boards to purge controversial books,[1] the constitutional issues presented by this practice have never been decided by this Court. It is the issue touched upon but left undecided in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), namely, to what extent are school professionals at the mercy of politically responsive, often elected, lay boards of education in determining what their

---

[1] Campaigns against school books have been waged by, among others, the American Legion and Veterans of Foreign Wars (texts were "un-American"), the Ku Klux Klan (books favored "papists and anti-Christian Jews of the Bolshevik Socialist stripe"), DAR (insufficient emphasis on military history), National Council for Prevention of War (insufficient emphasis on the peace-loving qualities of American heroes), organized labor, WCTU, and the National Association of Manufacturers (books "laced with anti-business sentiment and economic determinist and socialistic theories"). Nelson and Roberts, *The Censors and the Schools*, 28-37 (1963).

Nor is the problem one which has been confined to the distant past. A perusal of issues of the American Library Association *Newsletter on Intellectual Freedom* for the past two years reveals attacks on libraries for shelving books such as Cleaver, *Soul On Ice;* Roth, *Goodbye Columbus;* Brown, *Manchild in the Promised Land;* Griffin, *Black Like Me;* Carmichael, *Black Power;* Salinger, *Catcher in the Rye;* an anthology of modern literature because it contained such reputedly Communist authors as Langston Hughes, Richard Wright, Woody Guthrie, Martin Luther King, Malcolm X and Dick Gregory. It is noteworthy that books by nonwhite authors appear to come under particular attack.

students may read and learn in the schools. More than loyalty oaths, more than security investigations, more than armbands, it is an issue which lies at the heart of academic freedom. The issue was framed in *Epperson* as follows:

> "By and large, public education in our Nation is committed to the control of state and local authorities. . . . On the other hand, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' Shelton v. Tucker, 364 U.S. 479, 487 . . . ." *Id.* at 104.

Given the recurrence of attacks on school books, it is hardly an exaggeration to suggest that the resolution of those conflicting principles may well determine whether any book which challenges the current orthodoxy will be permitted in the schools. Regrettably, the courts below, showing almost unquestioning deference to the judgment of the school board, have indicated that libraries are not an area in which constitutional freedoms need receive "vigilant protection." While the limits of that viewpoint are not spelled out, the courts below would apparently not interfere with school boards which systematically purged the libraries of all books advocating peace or integration, or their curricula of all courses treating the United Nations. And, although the opinion suggests some solicitude for teachers who are actually dismissed, the courts' reasoning leaves little doubt that teachers who persisted in mentioning those subjects over the objections of the school board would do so wholly without constitutional protection. When this Court has so consistently defended the academic profession against the vagaries of political influence, *e.g.*, *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *Shelton*

v. *Tucker*, 364 U.S. 479 (1960); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), it would be ironic indeed if the federal judiciary were now to indulge such direct political intrusion into the materials that teachers will be permitted to assign.

Some recent newspaper stories illustrate the issues which are at stake here. In Connecticut, a school board ordered the book *Boss*, a political biography of Chicago Mayor Richard Daley, removed from a high school reading list because, as one Board member explained, it "slandered" local law enforcement officials and "doesn't tell the truth." *New York Times*, April 12, 1972. A New Jersey school board forbade its high school library from purchasing four books, including John Kenneth Galbraith's *The Affluent Society*, as reference materials for a federally funded American studies course. As the president of the Board of Education explained, "In my opinion, the books were too liberal and I disagree with their points of view." *New York Times*, June 17, 1972.

For the court below, this is only "intramural strife" which does not justify "intrusion of the judiciary into the internal affairs of the school." But if the judiciary does not intervene, to whom may parents, students and professionals look when their libraries and their curricula are stripped of books which happen to be in political disfavor with a shifting majority of the school board? Who, if not the federal courts, will prevent our nation's schools from becoming instruments of majoritarian propaganda? If, as appears to be the case, school boards are especially responsive to demands that schools not carry books which honestly deal with race relations in America,[2] will minori-

[2] See note 1, *supra*.

ties ever be able to secure the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954)? To abstain from controversies such as this will indeed create a "pall of orthodoxy," *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967), over our public schools.

The point was well made by a *New York Times* editorial entitled "Censors at Work," prompted by the Connecticut incident.

> "[C]ontrary to all denials, the exercise of the veto power over reading lists or library collections by school boards amounts to establishment of censorship —the removal of books for other than educational reasons. Teachers, librarians and school administrators naturally make choices concerning books—including textbooks—which are appropriate to the schools' purpose. But the introduction of either literary or political criteria by school board members—or of the even more elusive judgment of what constitutes 'truth' in a political volume—is a threat both to education and to freedom." April 14, 1972.

That philosophy has been given judicial expression in *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969):

> "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

I.

Constitutional principles of academic freedom limit the power of school boards even over allegedly educational matters.

To plaintiffs' contention that the ban of *Down These Mean Streets* from the shelves of the school district's libraries is unconstitutional,[3] the court below answers matter-of-factly that someone, after all, "has to make a determination as to what the library collection will be." Since the school board is given, by statute, ultimate responsibility for instruction within its schools, the court suggests that *any* determination which the board makes regarding its library collection is beyond judicial review. That position is not consistent with long-standing precedents of this court. To say that the school board has the conceded power to make educational decisions affords those decisions no greater immunity from constitutional principles than previous attempts to disguise unconstitutional actions with an educational veneer. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Bartels* v. *Iowa*, 262 U.S. 404 (1923); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). In the words of one circuit court,

---

[3] Although the court makes reference to the availability of "administrative procedures" and state judicial remedies for review of the "wisdom or the efficacy" of the school board's action, it is clear that the court did pass on the question of its constitutionality. It is, of course, settled law that persons seeking redress of constitutional rights by means of a 1983 action need not exhaust state judicial, *Monroe* v. *Pape*, 365 U.S. 167 (1961) or administrative remedies. *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

"[d]iscretionary power does not carry with it the right to its arbitrary exercise." *Shachtman* v. *Dulles,* 225 F.2d 938, 941 (D.C. Cir. 1955).

Two recent cases involving the dismissals of teachers using teaching materials of which the school boards disapproved are illustrative. In *Keefe* v. *Geanakos,* 418 F.2d 359 (1st Cir. 1969) and *Parducci* v. *Rutland,* 316 F. Supp. 352 (M.D. Ala. 1970), the school boards, as here, objected to the use of books which contained profanities and "vulgar" terms. Both courts found that interests of academic freedom outweighed the boards' conceded interest in regulating educational matters in their schools and reinstated the teachers. To the extent that the courts below dismiss those cases as inapplicable because the teachers there had been fired, while the librarian here had not, they impose a burden on challengers of unconstitutional action which is as unfair as it is unprecedented. See, e.g., *Epperson* v. *Arkansas,* 393 U.S. 97 (1968); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). It was the school board's order removing the book, and not the librarian's response, which implicated First Amendment values. It should not be and is not the law that she had to defy the ban and risk dismissal, with its attendant disruption of school functions, before having the right to challenge it.

This is an easier case than either *Keefe* or *Parducci.* In those cases, the books were *assigned* as a part of the classroom curriculum, thereby precluding alternative instructional materials which the school board could argue were more educationally valuable. In this case, the judgment of the librarians conflicted with no interest of the school board. The books' retention in the library would exclude no other books considered more valuable nor take up any

class time that could be put to better use. Thus, the broad implications of this Court's opinion in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), need not be considered. See generally, Hutchins, "The Constitution of Public Education," *The Center Forum*, Vol. II, No. 4 (July 1969).

II.

The removal of the book deprived students of their First Amendment right to know.

The court below, interpreting the students' argument as claiming an "unqualified first amendment right of access to books, unless they are obscene," found no constitutional deficiency in the removal of the book. But the students claim no such unqualified right. Rather, they assert three propositions: (1) that they no longer have access to a book previously available to them; (2) that their right to know has, to that extent, been impaired; and (3) that no "compelling" or "substantial" state interest justified that impairment. *NAACP* v. *Button*, 371 U.S. 415, 438, 444 (1963). The court's search for an unqualified right in this case is misplaced. The focus instead must be on what state interest is served by the board's action. "[T]he view that a 'right must be infringed before a remedy can be fashioned, has been steadily eroded; the focus of inquiry has shifted from identification of individual rights to an examination of the reasonableness of government action." Note, "Dismissal of Federal Employees—The Emerging Judicial Role," 66 *Col. L. Rev.* 719, 734 (1966). See, e.g., *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

If such compelling state interests were apparent, such as the "financial and architectural realities" suggested by the Second Circuit, the board's decision would raise no constitutional issues. But those realities were never even hinted at in this case. The school board was not engaged in the process of selecting books for its libraries. If it were, its decision to spend its limited dollars on books other than *Down These Mean Streets* would be defensible on educational grounds and beyond judicial review. Nor was there ever the suggestion that "architectural" considerations, such as limited shelf space, motivated the book's removal.

Two decisions of this Court treating the rights of minors, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Ginsberg* v. *New York*, 390 U.S. 629 (1968), provide the framework for determining whether a sufficient state interest can be shown to justify removal of the book. The court below conceded that the book had created no "substantial disorder" and expressed no opinion as to whether the book was obscene for minors.

The Court of Appeals sums up its rejection of plaintiffs' constitutional claims by pointing out that "discussion of the book or the problems which it encompasses or the ideas it espouses have not been prohibited by the Board's action . . . ." Conveniently ignored is the fact that the book itself cannot be read. To permit school boards arbitrarily to deprive students of the opportunity to read books previously available in the school library violates the principle that "government should leave the mind and spirit of man absolutely free . . . . [P]ublic officials cannot be constitutionally vested with powers to select the ideas people can think about. . . . " *Adler* v. *Board of Education*, 342 U.S. 485, 497 (1952) (Black, *J.*, dissenting).

CONCLUSION

For the reasons stated above certiorari should be granted.

Respectfully submitted,

ALAN H. LEVINE
c/o New York Civil Liberties Union
84 Fifth Avenue
New York, New York
Attorney for Petitioners

BURT NEUBORNE
MELVIN L. WULF
Of Counsel

July 19, 1972

APPENDIX

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 494—September Term, 1971.

(Argued February 22, 1972 Decided March 21, 1972.)

Docket No. 71-1958

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Plaintiffs-Appellants,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25, and ANTOINETTE MCCARTHY,

Defendants-Appellees.

Before:

MEDINA, LUMBARD and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Jacob Mishler, *Judge,* dismissing appellants' complaint which alleged that a resolution of a local community school board requiring the

removal of a particular book from the junior high school libraries within its jurisdiction violated the first amendment of the constitution.

Affirmed.

ALAN H. LEVINE, New York, New York (New York Civil Liberties Union, New York, N.Y., Burt Neuborne, of counsel), *for Plaintiffs-Appellants.*

HAROLD F. HAY, Forest Hills, New York, *for Defendants-Appellees.*

O'LEARY & O'LEARY, Jamaica, New York, *for Intervenor Defendant-Appellee Antoinette McCarthy.*

IRWIN KARP, New York, New York, *for The Authors League of America, Inc., Amicus Curiae.*

MULLIGAN, *Circuit Judge:*

This is an appeal from an order of Chief Judge Jacob Mishler, United States District Court, Eastern District of New York, dismissing plaintiffs' civil rights action which was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343, seeking an injunction and declaratory relief against Community School Board No. 25, Queens, New York, Cormac K. Meagher, Community Superintendent of Community School District No. 25, and Antoinette McCarthy, a representative of the Committee for Parents' Rights in Public Education. We affirm.

The plaintiffs-appellants in this case are the Presidents Council, District 25, an organization of presidents and past presidents of various parent and parent-teacher associations in the district, three junior high school students

enrolled in schools in the district, seven parents and guardians of minors who attend junior high schools in the district, two teachers, a librarian and the principal of a junior high school, all within the district and under the jurisdiction of the Board. This litigation commenced as a result of the decisions of the duly elected Community School Board (hereinafter Board) of Community School District 25 (hereinafter District), which in executive session on March 31, 1971, voted five to three to remove from all junior high school libraries in the District all copies of *Down These Mean Streets,* a novel by Piri Thomas. At a public meeting on April 19, 1971 the resolution was again duly adopted by a vote of five to three. Pursuant to the resolution the defendant community superintendent had the book removed. At a public meeting of the Board on June 2, 1971 a resolution was unanimously passed permitting the book to be kept at those schools which previously had the book in their libraries but making it available on a direct loan basis to the parents of children attending these schools.

It is conceded by the parties in this suit that the Board was duly and legally elected and that the resolutions were duly adopted by the Board at the public meetings of April 19 and June 2, 1971. It is further uncontested that the students at the three junior high schools affected (Junior High School Nos. 185, 189 and 218) range in age from 11 to 15 years. The parties do not dispute that in New York City the selection of textbooks and other instructional material has been delegated by the Legislature of the State of New York to the Community School Board.[1] It is also

---

1 N.Y. Educ. Law §2590-e (3) (McKinney 1970) provides:

§2590-e. Powers and duties of community boards

Each community board shall have all the powers and duties, vested by law in, or duly delegated to, the local school board districts and the board of education of the city district on the effective date of this article, not inconsistent with the provisions of this article and the policies established by the city board, with respect to the control

clear that there are administrative procedures available to review the decisions of the Community School Boards in New York.[2] Any final administrative action is reviewable under Article 78 of the New York Civil Practice Law and Rules.[3]

The book, which has created the controversy and provoked the action of the Board, *Down These Mean Streets*, is an autobiographical account by Piri Thomas, of a Puerto Rican youth growing up in the East Side Barrio (Spanish Harlem) in New York City. Predictably the scene is depressing, ugly and violent. The argot of the vicinage is replete with four letter and twelve letter obscenities unreported by Tom Swift or even Tom Jones. Acts of criminal violence, sex, normal and perverse, as well as episodes of drug shooting are graphically described. The book has

---

and operation of all pre-kindergarten, nursery, kindergarten, elementary, intermediate and junior high schools and programs in connection therewith in the community district. The foregoing shall not be limited by the enumeration of the following, each community board shall have the power and duty to:

. . . .

3. determine matters relating to the instruction of students, including the selection of textbooks and other instructional materials; provided, however, that such textbooks and other instructional materials shall first have been approved by the chancellor.

2 N.Y. Educ. Law §310 (5)-(6) (McKinney 1970) provides for an appeal to the state commissioner of education by any person "conceiving himself aggrieved" by any action by the trustees of any school library in relation to the books therein or by any action by any district meeting in relation to the library. See *e.g.*, *In the Matter of Korublum*, 70 St. Dept. Rep. (Educ.) 19 (1949) where the commissioner held that a citizen and taxpayer had no constitutional right to compel the Board of Education of the City of New York to retain the magazine, "The Nation", in its school libraries.

Further, N.Y. Educ. Law §2590-*l* (McKinney 1970) empowers the chancellor of the city school district of the City of New York to override any decision of a community board inconsistent with the educational policies of the city board.

3 See *e.g.*, *Rosenberg* v. *Board of Educ.*, 196 Misc. 542, 92 N.Y.S. 2d 344 (Sup. Ct. 1949).

been made available to the court and in a soft cover reprint is available to the public for an investment of $1.25. Presumably the educational value of this work, aside from whatever literary merit it may have, is to acquaint the predominantly white, middle-class junior high school students of Queens County with the bitter realities facing their contemporaries in Manhattan's Spanish Harlem. Some parents objected to the public school library stocking the book, which they claimed would have an adverse moral and psychological effect on 11 to 15 year old children, principally because of the obscenities and explicit sexual interludes. The plaintiffs on the other hand have supplied affidavits from psychologists, teachers, and even children who claim the book is valuable and had no adverse effect on the development of the children of the District. One thirteen year old boy solemnly swears and assures us that the book has "literary merits" and is not a "corruptive influence".

Since the Legislature of the State of New York has by law determined that the responsibility for the selection of materials in the public school libraries in New York City is to be vested in the Community School Board (n. 1, *supra*), and the Commissioner of Education of that State has defined the purposes of the public school library,[4] and in further view of the procedures for administrative and state court review provided in New York (nn. 2 and 3,

---

4 The regulations of the Commissioner of Education of New York State provide:

"The book collection in the secondary schools shall consist of books approved as satisfactory for: (1) Supplementing the curriculum, (2) reference and general information, (3) appreciation and (4) pleasure reading. The course of study and the interest of boys and girls of given ages and grades are factors which should play a large part in the selection of books for a school library. Books of established quality and authority in sufficient quantity to meet all school needs are recognized as necessary tools and materials of instruction." 8 N.Y. Code, Rules & Regs. (Educ.) §91.1(b) (1966).

supra), we do not consider it appropriate for this court to review either the wisdom or the efficacy of the determinations of the Board. Our function is purely one of constitutional adjudication on the facts and the record before us: has the Board transgressed the first amendment rights of the plaintiff teachers, parents, librarian and children. In its most recent pronouncement on the subject the Supreme Court has stated: "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) (footnote omitted).

After a careful review of the record before us and the precedents we find no impingement upon any basic constitutional values. Since we are dealing not with the collection of a public book store but with the library of a public junior high school, evidently some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars. When the court has intervened, the circumstances have been rare and extreme and the issues presented totally distinct from those we have here.

See *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1051-54 (1968).

In *Epperson* v. *Arkansas*, *supra*, the court did strike down a state statute which made it unlawful for a teacher in any state supported school to use a text book that teaches that men are descended from a lower order of animals. The court vitiated the statute on the specific ground that "the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion." 393 U.S. at 106. "The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment." *Id.* at 107. Here, patently we have no religious establishment or free exercise question, and neither do we have the banning of the teaching of any theory or doctrine. The problems of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board. A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from discussing *Down These Mean Streets* in class or from assigning it for outside reading. In those libraries which have the book, the parent can borrow it and, if he sees fit, can loan it to his child if he wishes to read it.[5] The intrusion of the Board here upon any first amend-

5 In *Ginsberg* v. *New York*, 390 U.S. 629 at 639 (1968) Mr. Justice Brennan, recognizing the prime responsibility of parents for the well-being of their children, pointed out that the statute barring the sale of salacious material to children did not preclude the parent from purchasing it for their children. Here the school at state expense is making the book available to parents who may wish their children to read it.

ment constitutional right of any category of plaintiffs is not only not "sharp" or "direct", it is miniscule.

Appellants' reliance upon *Ginsberg* v. *New York*, 390 U.S. 629 (1968) is puzzling. In that case the Court upheld the constitutionality of a New York statute (N.Y. Penal Law §484-h (McKinney 1967)) which made it a crime to sell defined obscene material to minors under 17 years of age, whether or not the material would be obscene for adults. In upholding the concept of "variable obscenity" the court found the statute to be a rational legislative determination that the exposure of minors to such materials might be harmful and that the statute did not involve any invasion of constitutionally protected freedoms. Appellants' reading of the case as authority for the proposition that minors have an unqualified first amendment right of access to books, unless they are obscene under the statute, is totally unjustified. It equates the public school library, which has a function as an adjunct to the educational venture, with the entrepreneur seller of books who has no comparable responsibility. The public school library obviously does not have to become the repository, at public expense, for books which are deemed by the proper authorities to be without merit either as works of art or science, simply because they are not obscene within the statute. If someone authored a book advocating that the earth was flat, it could hardly be argued that the work could not be removed from the public school library unless it was also obscene. Appellants concede, or at least do not reject, the proposition that the Board has ultimate authority for the initial selection of the public school library collection. They suggest, however, that we have a different case where, as here, the book was once shelved and is now removed. They analogize the shelving and unshelving of a book to the constitutional right of a person to obtain

public employment and his rights to retain such employment when it is sought to be terminated. This concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover. It would seem clear to us that books which become obsolete or irrelevant or where improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place.

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) is equally far afield. There the court did intrude into the field of public education by invalidating a regulation of school principals which suspended students who wore black armbands to classes symbolizing their objection to hostilities in Vietnam. This was deemed a violation of their right to free speech under the first amendment in the absence of a showing that the conduct of the students materially disrupted classwork or involved substantial disorder or invasion of the rights of others. The appellant conveniently ignores the factual setting of *Tinker* but would have us apply its test. Since the shelving of *Down These Mean Streets* did not create any disruption or disorder, it is argued, it should remain on the shelf. There is here no problem of freedom of speech or the expression of opinions on the part of parents, teachers, students or librarians. As we have pointed out, the discussion of the book or the problems which it encompasses or the ideas it espouses have not been prohibited by the Board's action in removing the book.

The administration of any library, whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where

there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.[6]

Appellant finally urges upon us two cases *Keefe* v. *Geneakos*, 418 F. 2d 359 (1st Cir. 1969) and *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970). Both of these cases involved high school teachers of junior and senior students who assigned material for outside reading which school officials found offensive and inappropriate. Upon a refusal to comply with the orders of school authorities to desist, the teachers were discharged. To the extent that these cases hold that first amendment rights have been violated whenever a district court disagrees with the judgment of school officials as to the propriety of material assigned by a teacher to students, we are not in accord.[7] In any event, both cases involved the discharge of teachers with concomitant issues of procedural due process which are not present here and therefore the cases are not controlling.[8]

---

6 Other Supreme Court cases relied upon by appellants are inapposite. In *Shelton* v. *Tucker*, 364 U.S. 479 (1960) the court found unconstitutional an Arkansas statute requiring public school teachers to file annual affidavits listing all organizational affiliations without limitation for a five year retroactive period; in *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) the court invalidated New York teacher oath and loyalty laws as vague and ambiguous. In contrast, there is no inhibition of extramural teacher or librarian association whatsoever in the case before us. If the Board ordered a list of all books read or owned by the staff, these cases might be in point.

7 While the First Circuit has indicated that it does not "regret" its decision in *Keefe* v. *Geneakos*, *supra*, its enthusiasm for intrusion into academic issues seems to be lessening, see *Mailloux* v. *Kiley*, 436 F.2d 565, 566 (1st Cir. 1971) and *Mailloux* v. *Kiley*, 448 F.2d 1242 (1st Cir. 1971).

8 That the discharge of the teacher in *Keefe* v. *Geneakos*, *supra*, was a vital fact is apparent from its decision (418 F.2d at 362), when it emphasized this element to distinguish the facts from *Parker* v. *Board of Educ.*, 237 F. Supp. 222 (D. Md. 1965). In that case the teacher was not discharged, but since he had no tenure, there was no obligation to renew his contract. On this point the lower court was affirmed in 348 F.2d 464 (4th Cir. 1965) *cert. denied*, 382 U.S. 1030 (1966).

In view of the facts in the record before us and the controlling precedents, we find no constitutional infirmity in the resolutions of the Board.

Affirmed.

Memorandum of Decision and Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 71-C-601

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend, Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES & EVELYN SUSSMAN,

Plaintiffs,

—against—

COMMUNITY SCHOOL BOARD NO. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25, and ANTOINETTE MCCARTHY,

Defendants.

August 4, 1971

This is a civil rights action brought pursuant to 42 U.S.C. §1983, jurisdiction being grounded on 28 U.S.C. §1343. Plaintiffs,[1] in their amended complaint, claim that

[1] Plaintiffs are (a) Presidents Council District 25, an organization of presidents and past presidents of various parent and parent-teacher associations in Community School District No. 25; (b)

defendants,[2] acting under color of state law, have deprived them of rights secured to them by the First Amendment, and of due process of law as guaranteed by the Fourteenth Amendment. They seek an injunction and declaratory relief.

A hearing was held on the motion for a preliminary injunction on June 1, 1971. Subsequently, plaintiffs moved for summary judgment or alternatively for both a temporary and permanent injunction, praying further that any additional hearing which the court might find necessary be consolidated with a trial on the merits pursuant to F.R.Civ.P. Rule 65(a)(2). Defendants Community School Board No. 25 and Antoinette McCarthy have moved to dismiss the complaint or alternatively for summary judgment. Several briefs have been submitted *amicus*

---

three students, one attending Junior High School 185, and the other two attending Junior High School 189, both schools being within Community School District No. 25 and under the jurisdiction of the defendant Community School Board (Board); (c) seven parents and guardians of minor children attending Junior High Schools 185, 189 and 218, all within Community School District No. 25 and under the jurisdiction of the Board; (d) two teachers working at Junior High School 189, which school is within Community School District No. 25 and under the jurisdiction of the Board; (e) a librarian at Junior High School 185, which school is within Community School District No. 25, and under the jurisdiction of the Board; and (f) the Principal of Junior High School 189, which school is within Community School District No. 25, and under the jurisdiction of the Board.

[2] Defendants are (a) Community School Board No. 25, the duly elected school board of Community School District No. 25, Queens, New York; (b) Cormac K. Meagher, duly appointed Community Superintendent of Community School District No. 25; and (c) Antoinette McCarthy, individually and as a representative of the Committee for Parents' Rights in Public Education. [Mrs. McCarthy was not an original defendant, but moved to intervene as such subsequent to the filing of the complaint, which motion was granted.]

curiae.[3] A hearing was held on July 16, 1971, at which all of the above mentioned motions were argued.

Plaintiffs' claim arises out of the following circumstances: on March 31, 1971, defendant Community School Board (Board), of Community School District No. 25 (District), meeting in executive session, voted five to three to remove all copies of *Down These Mean Streets*, a novel by Piri Thomas, from the school libraries of all schools under the jurisdiction of the Board. This resolution was duly adopted at a public meeting held on April 19, 1971, where it again passed by a vote of five to three.[4] According to a direction contained in the resolution defendant Community Superintendent Meagher (Superintendent) had the book removed from those school libraries which had copies.[5]

Plaintiffs allege that the resolution adopted by the Board, and the action taken by the Superintendent in com-

---

[3] The *amici* are: (a) Hyman Rosner, Betty Louise Felton, James O'Hara, and Edna Turner, minority members of Community School Board No. 25; (b) Local 2 of the American Federation of Teachers (AFL-CIO); and (c) the Author's League of America.

[4] The resolution adopted by the Board at its public meeting of April 19, 1971, reads as follows:

> The Superintendent is hereby directed to remove "Down These Mean Streets" by Piri Thomas from all student libraries in the district.
>
> The Board hereby instructs Dr. Meagher to immediately appoint a professional committee to recommend to the Board guidelines for the selection of books.

[5] "Down These Mean Streets" is an autobiographical novel describing the childhood of a boy in Spanish Harlem. It gives a vivid picture of the material and cultural deprivation to which the boy was subject, the sordid existence of which he partook, and the bitter humor with which he and his fellows attempted to leaven their lot. It is revealing in its exposition of the racial tensions between Blacks, Whites and Puerto Ricans. Homosexual and heterosexual acts are candidly described with a liberal sprinkling of four letter words in past, present and future tenses.

pliance with that resolution, deprive all of them of ". . . their rights to academic freedom under the First Amendment . . . " (Amended Complaint, ¶16), and further deprive the teacher, librarian and principal plaintiffs of ". . . their liberty to freely practice their profession in accordance with professional standards in violation of the due process clause of the Fourteenth Amendment." (Amended Complaint ¶17). Accordingly, plaintiffs request that the court declare the resolution adopted by the Board unconstitutional, and order the defendants to replace the book on the shelves of the libraries from which it was removed, and enjoin them from interfering with other school libraries within their jurisdiction which desire to purchase the book.[6]

The following facts are either conceded by all parties or uncontested:

1. The Board is the duly and legally elected Community School Board of Community School District No. 25.

---

[6] At a special public meeting held subsequent to the initiation of the suit, (the original complaint was filed on May 19, 1971), the Board adopted, by a 5-0 vote, with three abstentions, a resolution modifying the original resolution adopted on April 19, 1971. The text of this resolution, passed at the public meeting on June 2, 1971, is as follows:

> The district copies of *Down These Mean Streets* shall be kept at the schools which previously had the book in their respective libraries, and shall be loaned directly to the parents of the children attending these schools who request the book. The Superintendent shall establish and forthwith put into effect a procedure for the implementation of the above.

On June 25, 1971, the plaintiffs filed an amended complaint realleging everything that had been contained in the original complaint, but also alleging the passage of the above resolution, and alleging that it too was unconstitutional on the grounds already discussed. The amended prayer seeks to have both resolutions declared unconstitutional, and to have the operation of both enjoined.

2. Cormac K. Meagher is the duly appointed Community Superintendent of Community School District No. 25, chosen by the Board.

3. The power of the state to determine matters relating to the education of students, including the prescription of a curriculum and the selection of textbooks and other instructional material, has been delegated by the New York State Legislature to the duly elected Community School Boards in New York City.[7]

4. The resolutions adopted by the Board at the public meetings held on April 19, 1971 and June 2, 1971 were duly adopted by the Board.

5. *Down These Mean Streets,* by Piri Thomas, was removed from the school libraries of Junior High Schools 185, 189 and 218 pursuant to the resolution adopted by the Board on April 19, 1971, by defendant Superintendent, and other schools in the District were barred from placing the book on their library shelves.

6. The students at Junior High Schools 185, 189 and 218 range in age from 11 to 15 years.

7. (a) The state has provided administrative procedures for the review of arbitrary actions on the part of Community School Boards.[8]

---

[7] N.Y. Education Law, §2590-e.

> . . . each community board shall have the power and the duty to:
>
> . . .
>
> 3. determine matters relating to the instruction of students, including the selection of textbooks and other instructional materials; provided, however, that such textbooks and other instructional materials shall first have been approved by the chancellor.

[8] New York Education Law §§310 and 2590-1.

(b) Final administrative action is reviewable under Article 78 of the New York Civil Practice Law and Rules.

Discussion

Plaintiffs are divided into three sets: (a) the students; (b) the parents and guardians; and (c) the teachers, librarian and Principal. The rights of each of these sets, and their possible infringement, must be discussed separately, since they differ one from another as alleged and argued by plaintiffs' counsel.

Plaintiff students claim that they have a right to know, or right of access to publications, under the First Amendment. They claim the right to read *Down These Mean Streets* without restriction, citing *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733 (1969). They see *Ginsberg* v. *New York,* 390 U.S. 629, 88 S.Ct. 1274 (1968) as requiring the Board to make the book available absent a finding of obscenity. Further, they find the resolution of June 2, 1971, called by them the "parent option plan," an abridgment of their First Amendment rights under *Lamont* v. *Postmaster General,* 381 U.S. 301, 85 S.Ct. 1493 (1965).

Tinker held that high school students were "... entitled to freedom of expression of their views," 393 U.S. at 511, 89 S.Ct. at 739, in demonstrating their opposition to the Viet Nam war. It is significant that in *Tinker* the Court dealt with and spoke of a right of *expression.* It said nothing of the corollary right of *access* to publications, i.e., the right to know.[9]

---

[9] It is also significant that the Court put distinct limits on the exercise of the students' right of free expression:

"... [b]ut conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of

A child's First Amendment right of access to reading material is not co-extensive with the right of adults. *Ginsberg* v. *New York, supra*, 390 U.S. at 636-37, 88 S.Ct. at 1279. In *Ginsberg*, the Court rejected appellant's argument "... that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor." 390 U.S. at 636, 88 S.Ct. at 1279. Rather, the Court approved a distinction between children and adults when constitutional liberties and their exercise are involved: "... we have recognized that even where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." [Citing *Prince* v. *Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 444 (1944)] 390 U.S. at 638, 88 S.Ct. at 1280. The Court then went on to uphold the New York statute attacked by the appellant, which statute made criminal the furnishing to children of sexually-oriented reading matter which would concededly have been constitutionally protected reading matter were the rights of an adult involved.[10] *Ginsberg* in no way stands for the proposition advanced by plaintiffs in reliance upon it: that if a state cannot totally ban a book it cannot bar its school libraries from loaning it.

This court must thus conclude that the students had no constitutional right to have *Down These Mean Streets*

---

behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513, 89 S.Ct. at 740.

[10] The Court had previously intimated that such a position would be taken, were the case to arise, as it subsequently did. *See Jacobellis* v. *Ohio*, 378 U.S. 189, 195, 84 S.Ct. 1676, 1682 (1964).

freely available to them in the school libraries. On the contrary, the Board, acting pursuant to its statutory powers, had discretion to order the book or refuse to do so, to put it on the school library shelves or remove it therefrom. The Board has the general power to determine curriculum, which must of necessity include the selection of reading matter to be available in the schools, subject only to certain powers of the Chancellor of the New York City School System.

Having no right to have the book available to them in school, no right is abridged by the institution of the "parent option system." In *Lamont* v. *Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493 (1965), the Court struck down a statute requiring addressees to whom unsealed Communist propaganda is consigned to perform an "official act" in order to receive the propaganda through the mail. The Court considered this requirement " . . . an unconstitutional abridgment of the addressee's First Amendment rights," in that it would tend to chill the exercise of those rights. As the exercise of a child's First Amendment right of access within a public school is subject to the discretionary power of the Board, and the Board may constitutionally ban the book from the schools entirely, the Board, in adopting the "parent option system," is not infringing any right but rather granting one where none before existed.

Plaintiff parents concede that " . . . the state has a legitimate interest in the education of its minor citizens . . . " (Plaintiffs' Memorandum of Law, filed May 19, 1971, p. 4). However, they claim that this interest must submit to the superior right of the parents and guardians " . . . to direct the upbringing and education of the children under their

control." (Id.)[11] Plaintiffs cite *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923) and *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925), as support for their position.

The rationale underlying Justice McReynolds' decisions for the Court in *Meyer* and *Pierce* has been decisively rejected in later cases.[12] The concept of the Due Process Clause of the Fourteenth Amendment as being a grab-bag of substantive rights has held little currency for over thirty years. However, the question of whether or not the holdings in *Meyer* and *Pierce* retain any validity is not before this court. This is so because the language of both of those opinions makes it clear that the Court, in holding as it did, had no intention of abridging, and indeed specifically recognized, the power of the state to dictate a curriculum for use in public schools.

In *Meyer*, the Court struck down a Nebraska statute which made it illegal to teach a foreign language to students who had not completed their eighth grade. Meyer, originally the defendant in the case, was a teacher in a parochial school maintained by the Zion Evangelical Lutheran Congregation. Finding that the statute in question violated Meyer's rights under the Due Process Clause

---

[11] The argument that parents' rights are superior to those of the state is a double-edged sword. There are admittedly many issues in educational policy upon which parents will differ. Were each child to be educated solely in accordance with its parents' views on education, public education as such would become impossible.

[12] *See, e.g.*, *West Coast Hotel* v. *Parrish*, 300 U.S. 379, 57 S.Ct. 578 (1937); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 72 S.Ct. 405 (1952); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461 (1955); and see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Supreme Court Review 34.

of the Fourteenth Amendment, the Court stated that "[h]is right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment." 262 U.S. at 400, 43 S.Ct. at 627. The rights of parents, however, were not without substantial limitations:

> . . . The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. *Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports.* Those matters are not within the present controversy. [Emphasis supplied.] 262 U.S. at 402, 43 S.Ct. at 628.

Pierce involved an Oregon statute requiring every parent or guardian of a child between the ages of 8 and 16 years to send the child to a public school. Two suits, both involving organizations which ran private schools, challenged the constitutionality of the statute. The Court, citing *Meyer*, again found the statute under scrutiny to be void as in violation of the Due Process Clause. The specific right which the Court found to be unconstitutionally infringed was the right of the defendant organizations to run schools. 268 U.S. at 543, 45 S.Ct. at 573.

Despite the holding of the Court, the opinion carefully affirmed the state's general power over the education of children. It said:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some

> school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. 268 U.S. at 543, 45 S.Ct. at 573.

Meyer and *Pierce*, then, cannot be read to stand for the broad proposition advanced by the plaintiffs: that parents' rights to direct the education of their children are necessarily superior to the rights of the state. In *Prince* v. *Massachusetts*, 321 U.S. 158, 64 S.Ct. 438 (1944), the Court dealt with the parent-state conflict in a more modern manner. In that case the guardian of a minor child had been convicted of violating a penal statute regulating the labor of children, in that she had permitted her ward, a small girl, to sell the publications of the Jehovah's Witnesses on the streets at night. The appellant argued that the statute (a) violated her First Amendment right to free exercise of her religion, and (b) violated her rights as a parent and guardian under the Due Process Clause, citing *Meyer*. Characteristic of the change in judicial philosophy which had intervened, the Court commented on the appellant's Due Process claim: "The due process claim, as made and perhaps necessarily, extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is comprehended in the latter." 321 U.S. at 164, fn. 8, 64 S.Ct. at 441, fn. 8. In rejecting the appellant's claim, the Court referred to the protection given by the Court in *Pierce* and *Meyer*, stating that ". . . neither rights of religion or parenthood are beyond limitation." 321 U.S. at 166, 64 S.Ct. at 442. After detailing the instances in which the state's power over

the education, rearing and upbringing of a child had been upheld, the Court concluded that

> "... the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." 321 U.S. at 167, 64 S.Ct. at 442.

Having decided that there is no absolute right in the parent to control all aspects of his child's education in the public schools, this court can find no substance or precedent for the argument that the parent has a specific right to control what literature shall be available to the child in school. No cases have been cited to the court, nor has the court been able to find any, which would substantiate that claim. It must thus be concluded that as between the state, represented here by the Board, and the parents, it is the state, under its general power to control curriculum in the public schools, which has discretion over the choice of library books.

Plaintiff teachers, librarian, and Principal claim a loss of "academic freedom" caused by the removal of the books, and further, an interference with their "right" to freely practice their profession in accordance with professional standards. They cite *Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969) and *Parducci* v. *Rutland*, 316 F.Supp. 352 (M.D. Ala. 1970) in support of their claim.

In *Keefe*, an English teacher assigned an article in the *Atlantic Monthly* as required reading for his English class. The school authorities found the article offensive and were about to take disciplinary action against the teacher when he brought suit to restrain them from so doing. The lower court refused to enjoin the disciplinary proceedings, but the Court of Appeals reversed. The reversal was based on procedural due process problems which are unrelated

to the instant discussion. *Parducci* is similar. There, a teacher was discharged for assigning to her high school class a certain short story repugnant to the school authorities. The district court ordered her reinstatement.

Both *Keefe* and *Parducci* involved procedural due process problems of notice that are not present here. This court will not attempt to divine the attitudes of the courts involved were they to be presented with cases not including such problems. It is true that in both cases the courts ruled on the suitability of the literature in question for the minds of high school students, finding that the respective article and story were indeed suitable. Nevertheless, this court has no need to do so, as no employee, teacher or otherwise, has been disciplined or threatened with discipline in the instant proceeding. Nor have any teachers been instructed not to assign the book. Thus, it is apparent that no right of academic freedom has been infringed.

As for plaintiff teachers' contention that they have a "right" to freely practice their profession according to professional standards, no authority has been cited and none found. If by so stating plaintiffs intimate that they seek to resurrect the discredited theory of "substantive" due process (see *supra*, n. 12), their argument must fail. The cases which have been cited by plaintiffs as general support are inapposite.[13]

---

[13] *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675 (1967), held that a statute providing for dismissal of university personnel for seditious statements or acts was void for vagueness. *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 76 S.Ct. 637 (1956), held that dismissal of a publicly employed professor for refusal to testify before a Congressional Committee violated his right to procedural due process. *Vought* v. *Van Buren Public Schools*, 306 F.Supp. 1380 (E.D. Mich. 1969), while sustaining the schools' right to promulgate a regulation forbidding possession of obscene material on school grounds, held that a student could not be expelled on the charge of such possession without a hearing.

After due consideration, this court must conclude that the claim of plaintiffs herein presents no federal question. The court has not considered the educational value of the book or the harm it might inflict on young children. The court refuses, as requested by the defendant Board, to consider whether there is a factual basis for its resolution of June 2, 1971. These issues are not relevant to the instant claim. They may be discussed and litigated elsewhere. Plaintiffs have available administrative and state remedies, since their claim is not of constitutional magnitude. In the final analysis, they have their right to challenge Board policy at the next election of Board members.

Findings of fact and conclusions of law as required by F.R.Civ.P. Rule 52(a) are included in the body of this opinion.

The Clerk is directed to enter judgment dismissing the complaint and it is

So ORDERED.

JACOB MISHLER
U. S. D. J.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of March one thousand nine hundred and seventy-two.

Present:

HON. HAROLD R. MEDINA,
HON. J. EDWARD LUMBARD,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend, BERNARD DALY; MARRY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES & EVELYN SUSSMAN,

Plaintiffs-Appellants,

v.

COMMUNITY SCHOOL BOARD NO. 25; CORMAN K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk.